EX PARTE OR LATE FILED

Small Cable Business Association

100 Greentree Commons
381 Mansfield Avenue Pittsburgh, PA 15220
Phone (412) 937-0099 FAX (412) 937-0098

November 11, 1998

Mr. William Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: Small Cable Business Association; Ex Parte Submission Regarding Small Cable Affiliation Standards; CS Docket No. 96-85

Dear Chairman Kennard:

The Commission has before it a rulemaking that will profoundly impact small cable businesses and their customers. This rulemaking will establish the final rule to determine when a small cable business operating small systems is eligible for deregulatory treatment under 47 U.S.C. § 543(m). The Commission's interim rule ignores the realities of the investment marketplace and wrongfully forces small cable businesses to chose between deregulation and access to capital. The Small Cable Business Association (SCBA) urges the Commission to craft a permanent rule that reflects the realities of small cable's capital markets and accomplishes the objectives of Congress.

As part of the Telecommunications Act of 1996, Congress deregulated the basic service rates for many small systems that offer a single tier of service and the CPST rates for other small systems. Congress sought to limit this relief to businesses that did not have access to the same resources as larger organizations. Consequently, Congress denied relief to small cable businesses "affiliated" with companies having more than $250 million in gross annual revenues. Congress, however, left to the Commission the task of defining "affiliate" as used in connection with small cable rate deregulation under 47 U.S.C. § 543(m).

Use SBA Affiliation Rules as a Guide

As outlined in detail in SCBA's Ex Parte Supplement dated October 11, 1996, the Small Business Administration (SBA) has established detailed regulations to prevent a large company from benefitting from SBA programs and resources designed to provide support to small businesses. These rules address many of the capital marketplace realities faced today by small cable businesses.

For example, the SBA rules address the following issues:

- **Control.** Consistent with the Commission's stated objectives,[1] SBA's regulations seek to determine whether a larger entity exercises control over the small business. Where control exists, SBA's regulations deem this relationship an "affiliation."[2]

- **Passive interests.** Passive investments do not give rise to affiliations.[3]

- **Passive entities by definition.** Affiliations cannot exist where entities/investors are prohibited by law from exercising control.[4]

- **Protection of Investment.** Reasonable provisions to protect investments will not give rise to an affiliation.[5]

The Commission should carefully consider the various elements of SBA's comprehensive affiliation rules at 13 C.F.R. §§ 121.103 and 107.865 for incorporation in the Commission's final rules.

Provisions Protecting Cable Investments

To fully reflect the realities of the capital markets, the small cable affiliation rules must permit inclusion of certain provisions typically employed to protect investments without creating an affiliation under the rules. Small cable investment and credit agreements typically include investment-protecting provisions, including the following:

- **Loss of key manager.** In the event the CEO of a small cable business withdraws from the business for any reason (*e.g.*, ill health or death), the financial backers typically have greater rights to become more involved in the business until it is either sold or the key person replaced.

- **Failure to meet cash flow targets.** Investors and creditors typically have greater participation in management decisions if a small cable business misses its cash flow targets by more than a certain margin (*e.g.*, more than 20%). Because cable system values are principally based on current cash flow, the moment cash flow

---

[1] *Order and Notice of Proposed Rulemaking*, CS Docket No. 96-85, In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 at ¶ 26 (Released April 9, 1996).

[2] 13 C.F.R. § 121.103.

[3] 13 C.F.R. § 121.103(c)(1) (finding an affiliation only where voting rights exist).

[4] 13 C.F.R. § 121.103(b)(5).

[5] 13 C.F.R. § 121.865(d).

falls, the value of the cable business also falls, impairing the value of the investment.

- **Pre-approval of budgets and business plans.** Rather than wait until a small cable business fails to meet unrealistic cash flow targets, most investors and creditors require the right to review annual budgets and accompanying business plans. This allows the investor or creditor to independently judge the achievability of the performance targets and ask for revision of the plans and budgets before poor financial results devalue the investment.

Inclusion of these types of provisions in small cable investment and credit agreements should not give rise to a finding of an "affiliation."

The Right to Approve Budgets and Business Plans Is Not Control.

SCBA's discussions with various Commission personnel revealed a concern that because the right to approve budgets and business plans may give rise to control in the context of broadcast affiliations then this should also give rise to affiliations with small cable businesses. Not so. An analysis of Commission decisions, Commission rulemakings and applicable statutes reveals distinctly different purposes behind the affiliation provisions, rendering the comparison invalid.

Examination of broadcast affiliation issues reveals a goal to determine the party ultimately in control of the broadcast station in order to determine who will select programming over the single broadcast channel. In the Commission's multiple ownership rulemaking, the Commission stated:

> The underlying multiple ownership rules are premised on the principle that 'a democratic society cannot function without the clash of divergent views'. . . . '[T]his idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility.' . . . '[T]he significance of ownership lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest.'[6]

---

[6] *Report and Order* in MM Docket No. 83-46, 97 FCC 2d 997 (1984) at ¶ 11 (internal citations omitted) (emphasis added), *recon. granted in part, Memorandum Opinion and Order* in MM Docket 83-46, 58 RR 2d 604 (1985), *further recon. granted in part, Memorandum Opinion and Order* in MM Docket 83-46, 1 FCC Rcd 802 (1986).

The Commission's concern with control over programming also underlies its examination of affiliation for purposes of cable/broadcast cross-ownership, the cable national subscriber limits and the cable channel occupancy limits:

> [T]he purpose of these cable attribution rules is similar to the purpose of the broadcast attribution rules: to identify those ownership thresholds that enable an entity to influence or control management or programming decisions (for broadcasters), or the programming marketplace (for the two cable concentration attribution rules). Further, Congress has suggested that the diversity rationale is relevant to cable.[7]

The concern of Congress currently before the Commission is fundamentally different.

Congress' concern with respect to "affiliation" for purposes of small cable rate deregulation is not premised on control over programming. It is based on the size of the affiliated company. By definition, any relationship with a non-cable entity that has less than $250 million in gross annual revenues cannot give rise to a disqualifying affiliation. Even if the other entity totally controls the programming in this circumstance, Congress would not be concerned. Nothing in the legislative history supports the proposition that Congress sought to bar any possible control over programming by companies with more than $250 million in gross annual revenues. Congress crafted this provision with another standard in mind.

The Commission previously has determined that certain small cable companies lacked the administrative resources and economies of scale to cope with the burdens of traditional rate regulation.[8] Congress took a similar stance regarding rate deregulation. Congress only sought to block relief where the small cable business has access to the resources of a large company — a company that would have sufficient resources and economies of scale to help the small company cope with the burdens of rate regulation.

The Commission must base any affiliation test on whether the small cable operator has the ability to access and use resources of the larger entity to obtain administrative support and economies of scale. Investment in, and limited oversight of, a small cable business by a large non-cable entity will typically not bring these benefits. The ability of the investor or creditor to review and pre-approve budgets and business plans does not provide an operator with access to the resources necessary to lessen the burdens of rate

---

[7] *Notice of Proposed Rulemaking*, MM Docket Nos. 94-150, 92-51 and 87-154, FCC 94-324 at ¶ 27 (released January 12, 1995).

[8] *Sixth Report and Order and Eleventh Order on Reconsideration* in MM Docket Nos. 92-266, 93-215, FCC 95-196 (released June 5, 1995).

regulation. Consequently, pre-approval of budgets and business plans should not give rise to an affiliation for these purposes.[9]

Requested Action

Congress never intended that the Commission adopt a regulatory structure that forces small cable businesses to choose between rate deregulation and access to capital. Rather, Congress sought to preclude only those small cable businesses that have access to the *resources* (not just to the *capital*) of larger companies from obtaining regulatory relief.

SCBA implores the Commission to establish meaningful rules that reflect the realities of the capital marketplace for small cable. SCBA continues to urge the Commission to adopt rules that mirror the SBA rules and rules that accommodate common real-life practices designed to protect investments in small cable businesses, not exercise control over their day-to-day operations.

Very truly yours,

Matthew M. Polka
President

cc: Commissioner Harold Furchtgott-Roth
Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Gloria Tristani
Deborah Lathen
William Johnson
Marjorie Reed Greene

---

[9] In the context of determining whether there exists an unauthorized transfer of control of a broadcast license, the Commission generally will look to a party's ability to set policy regarding finances, personnel and programming to determine whether such party has *de facto* control. *See News International, PLC*, 97 FCC 2d 349, at ¶ 20 (1984). Even though the Commission would likely consider an investor's ability to review budgets and business as indicia of control under its holding in *News International, PLC*, such finding has no relevance to this proceeding because potential control over programming decisions is not the concern Congress sought to redress with rate deregulation for small cable. In any event, SCBA does not believe that the right to pre-approve the budget and business plans of small cable businesses would significantly impact the broad range of services offered over multi-channel cable systems.